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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 13-633 PJH

v.

CRISTIAN QUINTERO FELIX,

Defendant.

**SECOND PRETRIAL ORDER; ORDER
DENYING MOTION TO SUPPRESS
EVIDENCE OF 2012 PRIOR ARREST
AND GRANTING REQUEST FOR
RULING ON SCOPE OF EVIDENCE**

Defendant Cristian Quintero Felix has filed a motion to suppress all fruits of the warrantless search and seizure of defendant on March 11, 2012, warrantless search of the car driven by defendant, search of the Alameda residence, and search of the cell phone. Defendant also requests a ruling specifying what evidence of the 2012 arrest and searches are admissible under FRE 404(b). The government filed an opposition brief. Given that the court has only one day to resolve the matter before trial commences, the motion is decided on the papers. Defendant's request for leave to file a supplemental exhibit, doc. no. 151, is GRANTED. For the reasons set forth below, the motion to suppress is DENIED. Based on the evidence identified in the government's opposition, the court further rules on the scope of the evidence of the 2012 arrest admissible under FRE 404(b) as follows.

I. Motion to Suppress

A. Exclusionary Rule Does Not Bar Evidence of Prior Arrest

Defendant cites no binding authority to support his contention that the Fourth Amendment governs the admissibility of any evidence that the government seeks to admit in its case-in-chief, even for the limited purposes of FRE 404(b). Neither of the district

1 court authorities cited by defendant decided or addressed any dispute whether the
2 exclusionary rule applies to evidence of a prior arrest admitted under FRE 404(b). See
3 *United States v. Arreola-Beltran*, 827 F. Supp. 2d 1188, 1197 (D. Idaho 2011) (where the
4 defendant's motion to suppress was denied by the state court in his prior state court
5 criminal proceeding, the district court determined, after conditionally excluding evidence of
6 prior bad acts or convictions under FRE 403 and 609(a), that collateral estoppel law did not
7 bar consideration whether the evidence seized during the defendant's prior arrest should
8 be suppressed); *United States v. Teaupa*, 2013 WL 870077 (D. Haw. Mar. 7, 2013)
9 (denying the defendant's motion to suppress, or in limine, to exclude statements he
10 previously made to a Hawaii County police officer after an arrest on a bench warrant
11 unrelated to the current proceedings, without mention whether the government challenged
12 applicability of the exclusionary rule to evidence of the prior arrest).

13 The government argues persuasively that the exclusionary rule does not bar
14 evidence introduced for limited purposes under FRE 404(b) because exclusion of
15 defendant's prior arrest evidence in this unrelated criminal proceeding would not have an
16 appreciable deterrent effect. See *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S.
17 357, 363 (1998) (the exclusionary rule "does not 'proscribe the introduction of illegally
18 seized evidence in all proceedings or against all persons,' but applies only in contexts
19 'where its remedial objectives are thought most efficaciously served'"') (quoting *Stone v.
20 Powell*, 428 U.S. 465, 486 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974)).
21 The government cites Ninth Circuit authority recognizing that the Fourth Amendment does
22 not bar admission of a prior arrest and search, even if illegal, where there is no suggestion
23 of any bad faith or collusion by the officers involved in the prior and the instant cases, and
24 where the officers in the prior arrest did not have the instant proceedings in their "zone of
25 primary interest." *United States v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995) (citing
26 *United States v. Lopez-Martinez*, 725 F.2d 471, 476 (9th Cir. 1984)) (internal citation and
27 quotation marks omitted). Here, there is nothing to suggest that "the first investigation and
28 prosecution might be planned to ensure the success of the second." *Lopez-Martinez*, 725

1 F.2d at 476. As in *Lopez-Martinez*, the exclusionary rule does not bar the introduction of
2 evidence of defendant's prior 2012 arrest in this proceeding because the "additional
3 measure of deterrence that might be provided by the exclusion in the [instant] trial of
4 statements from the [2012] arrest is too small to outweigh the cost to society of the loss of
5 relevant and probative evidence in [this] proceeding." *Id.*

6 B. 2012 Arrest and Searches Were Not Unconstitutional

7 Alternatively, the court has considered defendant's Fourth Amendment challenges to
8 the 2012 arrest and searches, and finds that the arrest and searches were not illegal.

9 1. Warrantless Search and Seizure of Defendant

10 Defendant was stopped on March 11, 2012, after an Alameda police officer
11 observed defendant's car indicate a left turn signal, then begin to turn right and make a
12 complete U-turn in an intersection. Hansen Decl., Ex. A at FELIX-0040. The officer
13 followed defendant's car and saw the car stop, being parked illegally, blocking a driveway
14 and more than 18 inches from the curb line. *Id.* See also Def. Suppl. Ex. at FELIX-0877.
15 Defendant got out of the driver's seat, and the officer approached defendant on foot, asking
16 for his driver's license or ID. The officer did not use overhead lights or sirens, and did not
17 impede defendant's path. Hansen Decl., Ex. A at FELIX-0040. Defendant responded that
18 he did not have a driver's license. The record demonstrates that up to that point, the initial
19 encounter was consensual and did not rise to the level of an investigatory stop. See *United*
20 *States v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994) ("Law enforcement officers do not
21 implicate much less violate the Fourth Amendment by merely approaching an individual on
22 the street or by asking him if he is willing to answer some questions.") (citations and
23 internal quotation marks omitted).

24 The officer reported that defendant was an unlicensed driver who was driving a
25 motor vehicle in violation of Vehicle Code § 12500(a). Hansen Decl., Ex. A at FELIX-0040.
26 The officer noted that defendant failed to provide an ID. Based on the officer's training and
27 experience, the officer knew that people tend to lie about their identity if they are
28 committing a crime. *Id.* The officer further noted that defendant was acting nervous,

1 sweating, and putting his hands in his pockets, which the officer asked him to stop doing. A
2 second officer arrived at that point. Based on defendant's furtive gestures toward his
3 pockets and nervous behavior, the officer believed defendant might have a weapon and
4 that officer safety was in jeopardy, and handcuffed defendant. *Id.*

5 Defendant denies that he had put his hands in his pockets or that he parked the car
6 illegally. Hansen Decl., ¶ 2. Defendant has not submitted a sworn declaration to that
7 effect, nor is there an indication, on the present record, that defendant challenged the
8 searches uncovering the presence of drugs, firearm and ammunition in the state court
9 criminal proceedings. Rather, defendant pled guilty to one of the weapons charges and a
10 lesser included drug possession offense. Although the police report was not made under
11 penalty of perjury, the record reflects that the arresting police officer testified at the
12 preliminary hearing in state court that he saw defendant "putting his hands in his pockets a
13 lot" and that defendant parked the car so that it was more than 18 inches away from the
14 curb and blocking a driveway. Def. Suppl. Ex. at FELIX-0877, 0881, 0886. The officer's
15 testimony corroborates the police report, and the record presents no genuine factual
16 dispute about what the officer observed.

17 Under the totality of the circumstances, the officer had reasonable suspicion that
18 defendant had committed a violation of § 12500, driving without a license, to conduct an
19 investigatory detention, and to handcuff him out of concern for officer safety after observing
20 defendant reaching into his pockets several times, even after being asked to stop doing so.
21 The officer then conducted a pat-down search for weapons, as well as for a valid ID card,
22 which was based on "specific and articulable facts" about concerns for officer safety,
23 indicating more than a general "governmental interest in investigating crime." *United*
24 *States v. I.E.V.*, 705 F.3d 430, 435 (9th Cir. 2012) (quoting *Terry v. Ohio*, 392 U.S. 1, 21,
25 23 (1968)). Defendant argues that there was no concern for officer safety after he was
26 handcuffed, but the *Terry* frisk was justified here based on articulated concern for
27 protection of the police officers and need to determine whether defendant was armed. See
28 *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022 (9th Cir. 2009) ("A wide variety of

1 factors support a reasonable belief that an individual is armed and dangerous[, including]
2 sudden movements or repeated attempts to reach for an object not immediately visible
3") (citations omitted). The detention and search of defendant's person, resulting in
4 discovery of a clear baggie containing a white powdery substance in defendant's right front
5 pants pocket that the officer believed to be cocaine, and which defendant said was "coke,"
6 did not violate defendant's Fourth Amendment rights.

2. Warrantless Search of Car Driven by Defendant

8 Defendant contends that the tow inventory search of the car he was driving on the
9 day of his 2012 arrest was unlawful because the government has failed to show that the car
10 was “parked illegally, posed a safety hazard, or was vulnerable to vandalism or theft,” to
11 justify the search under the community caretaking exception. Mot. at 13 (citing *United
12 States v. Burgos*, 550 Fed. Appx. 484, 486 (9th Cir. 2013) (quoting *United States v.
13 Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012)). The record demonstrates, however, not
14 only that defendant was an unlicensed driver, but also that defendant parked the car
15 illegally, blocking a driveway and parked more than 18 inches from the curb. Hansen Decl.,
16 Ex. A at FELIX-0040. The inventory search, pursuant to Vehicle Code § 14602.6, was
17 therefore reasonable. *Cervantes*, 703 F.3d at 1141 (“Under the community caretaking
18 exception, police officers may impound vehicles that jeopardize public safety and the
19 efficient movement of vehicular traffic.”) (citation and internal quotation marks omitted).

3. Search of Alameda Home

21 Defendant contends that the warrant authorizing the search of the Alameda
22 residence on March 12, 2012, was not supported by probable cause because the search
23 warrant affidavit did not establish a sufficient nexus to the Lincoln Avenue address to
24 support a fair probability that contraband or evidence of a crime would be found there.
25 Defendant contends that the affidavit relied on outdated “CRIMS” database information or
26 undefined “local database records” to establish the Lincoln Avenue address as defendant’s
27 current residence. The court determines, however, that it was reasonable for the affiant to
28 rely on the most recent address information available from the CRIMS criminal database.

1 even though defendant was not on probation or parole at the time of the stop.
2 Furthermore, defendant's address was corroborated by DMV records that were four years
3 old, which is not such an unreasonable length of time so as to render the DMV records
4 unreliable or stale. See Hansen Decl., Ex. B. The search warrant affidavit provided
5 sufficient information to establish probable cause for a search at the Lincoln Avenue
6 address, based on a "fair probability that contraband or evidence of a crime will be found in
7 a particular place, based on the totality of the circumstances." *United States v. Grant*, 682
8 F.3d 827, 832 (9th Cir. 2012) (citation and internal quotation marks omitted). The search of
9 the Alameda residence did not, therefore, violate the Fourth Amendment.

10 4. Search of Cell Phone

11 Defendant contends that his cell phone was searched without a warrant, and that the
12 photographs of the content of the phone must be excluded pursuant to *Riley v. California*,
13 134 S.Ct. 2473 (2014), which was decided after the search of the cell phone at issue was
14 conducted. The record demonstrates that a silver LG Metro PCS cell phone was found in
15 defendant's possession on the day of his March 2012 arrest, and that the police checked
16 the phone to look for evidence of sales. Hansen Decl., Ex. B at FELIX-0750. Although the
17 government's opposition brief confuses the date of the prior arrest with the date of the
18 current arrest, the controlling law at the time of defendant's 2012 arrest permitted an
19 officer's warrantless search of the text message folder of a cell phone seized after arrest as
20 a valid search incident to arrest. Opp. at 6 (citing *People v. Diaz*, 51 Cal. 4th 84 (2011)).
21 As the government points out in its opposition brief, *Riley* was not decided until June 25,
22 2014, and the evidence of the text message on defendant's cell phone was obtained during
23 a search conducted in reasonable reliance on binding precedent at the time of the search.
24 *Id.* (citing *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during
25 a search conducted in reasonable reliance on binding precedent is not subject to the
26 exclusionary rule.")). The fruits of the pre-*Riley* search of defendant's cell phone, incident
27 to his 2012 arrest, are not, therefore, subject to the exclusionary rule.

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1 Moreover, even if a search warrant were required to search the cell phone at the
2 time of defendant's arrest in 2012, the text message and other contents would be
3 admissible under the inevitable discovery doctrine. See *United States v. Lang*, 149 F.3d
4 1044, 1047 (9th Cir.) (citing *Nix v. Williams*, 467 U.S. 431 (1984)), amended by 157 F.3d
5 1161 (9th Cir. 1998). The 2012 search warrant affidavit requested "a search for Quintero's
6 cellular phone(s)," based on the affiant's training and experience that it is common for drug
7 traffickers to communicate with customers via cellular phone, and the warrant authorized
8 the seizure of "any records, whether stored on . . . programmable instruments such as
9 telephones, cell phones," and the search of "all of the above items." Hansen Decl., Ex. B at
10 FELIX-0744-45, 0749. The record shows a reasonable probability that discovery of the text
11 message and other contents of the cell phone was inevitable pursuant to the search
12 warrant.

13 II. Evidence of 2012 Arrest Admissible Pursuant to FRE 404(b)

14 Defendant seeks a determination of which exhibits and/or testimony regarding the
15 2012 prior arrest is admissible at trial to prove knowledge or intent under FRE 404(b).
16 Based on the limited information provided by the parties about the disputed evidence and
17 representations of the government, the court rules as follows:

18 A. Evidence Seized from Defendant's Cell Phone on March 11, 2012

- 19 1. Cell phone and photograph of text message on cell phone received
20 Mar 11 from Adrian E: admissible to show intent to distribute narcotics
- 21 2. Photos on cell phone showing defendant with uncharged firearms:
22 NOT admissible, as conceded by the government

23 B. Evidence of the 2012 Arrest and Search

- 24 1. Photographs of items seized from defendant and/or the car driven by
25 defendant, Hansen Decl., Ex. D: admissible to show knowledge of
26 drugs and/or firearms, and intent to distribute narcotics and/or use
27 firearms in furtherance of drug trafficking.

1 2. Defendant's admission that he had "coke" when he was searched, and
2 the officers' testimony that they found drugs, a firearm and ammunition
3 in the car driven by defendant: admissible to show knowledge of
4 narcotics and firearms, and intent to distribute narcotics and/or use
5 firearms in furtherance of drug trafficking.

6 3. The government indicates that the drug evidence that is in the custody
7 of the Superior Court cannot be released absent a specific order of the
8 court detailing certain custody requirements, but no proposed order
9 has been submitted to the court, and at this juncture, would not likely
10 provide the Superior Court sufficient time to process the request for
11 release of the drug evidence for admission at this trial.

12 C. Evidence Seized from Defendant's Home on March 12, 2012

13 1. Evidence of digital scales, \$1600 in cash and drugs taken from closet
14 in defendant's bedroom: admissible to show knowledge and intent to
15 distribute narcotics. Defendant's objection that these items have not
16 been adequately tied to him to be relevant under FRE 404(b) is
17 OVERRULED in light of the police reports indicating that defendant
18 shared the bedroom with only his 15-year old brother, and that extra
19 large clothes and court correspondence addressed to defendant were
20 found in the closet, which are sufficient indicia to allow a jury to
21 reasonably conclude that the closet in the bedroom was defendant's.
22 Hansen Decl., Ex. A at FELIX-0047-48.

23 2. Medication found in defendant's mother's room: NOT admissible, as
24 conceded by the government.

25 D. 2012 Conviction Records

26 The government has not addressed defendant's objection to admission of the prior
27 conviction records pursuant to FRE 404(b). Because defendant pled to simple possession
28 of a controlled substance in the state court proceeding, the prior conviction is admissible

1 pursuant to FRE 404(b) only to show knowledge, but not intent to distribute. See *United*
2 *States v. Ramirez-Robles*, 386 F.3d 1234, 1242-43 (9th Cir. 2004) (prior “user quantity”
3 conviction can only be used to prove that Ramirez-Robles knew what methamphetamine is
4 and how to identify it.”). Similarly, defendant’s prior conviction for possession of a
5 concealed firearm is admissible under FRE 404(b) for the limited purpose of showing
6 knowledge of firearms, but not intent to use firearms in furtherance of drug trafficking.

7 E. Testimonial Evidence

8 Defendant represents that the government seeks to prove up the 2012 prior conduct
9 through the testimony of six different witnesses, but the government has not, in opposition
10 to the instant motion, identified which witnesses are expected to testify on which disputed
11 issues pursuant to FRE 404(b). The parties are expected to meet and confer on disputed
12 testimony that is not governed by the scope of the pretrial orders. Any further disputes
13 regarding the testimonial evidence will be addressed after trial commences. No further
14 written motions may be filed without leave of court and the court will not entertain any such
15 requests over the weekend.

16 **IT IS SO ORDERED.**

17 Dated: October 31, 2014


18 PHYLLIS J. HAMILTON
19 United States District Judge

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